No. 83-770

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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THE CITY OF NEW YORK and THE STATE OF NEW YORK,
*Appellants,*

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION, THE MATERIALS TRANSPORTATION BUREAU OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, and COMMONWEALTH EDISON COMPANY, *et al.*,
*Appellees.*

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**On Appeal from the United States Court of Appeals for the Second Circuit**

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## MOTION TO DISMISS OR AFFIRM OF COMMONWEALTH EDISON COMPANY, *ET AL.*

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HARRY H. VOIGT *
LEONARD M. TROSTEN
MINDY A. BUREN
LEBOEUF, LAMB, LEIBY
& MACRAE
Suite 1100
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 457-7500
*Attorneys for Appellees Commonwealth Edison Company, et al.*

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTION PRESENTED

The question presented by Appellants in their Jurisdictional Statement is as follows:

> Whether the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361, and the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1812, require that an Environmental Impact Statement be prepared prior to promulgation of a regulation by the United States Department of Transportation which allows the shipment of spent-fuel from nuclear reactors and other large-quantity shipments of radioactive materials through high-density urban areas, to consider the low probability, but catastrophic consequence risks attendant to shipment of such materials through urban areas, and to consider alternative modes of transporting such materials, including barging.

## STATEMENT REQUIRED BY SUPREME COURT RULE 28.1

Pursuant to Rule 28.1 of the Rules of the Supreme Court, counsel for Appellees Commonwealth Edison Company, *et al.* hereby list the following interested parties:

| Party | Parent | Subsidiaries and Affiliates |
|---|---|---|
| Commonwealth Edison Company | — | — |
| Consolidated Edison Company of New York | — | Honeoye Storage Company |
| Georgia Power Company | The Southern Company | — |
| Long Island Lighting Company | — | — |
| Northeast Utilities | — | — |
| Northern States Power Company | — | (All subsidiaries are wholly owned) |
| Pacific Gas and Electric Company | — | Alberta Natural Gas Company, Ltd. |
| | | Angus Chemical Company |
| | | Angus Petrotech Corporation |
| | | Pacific Gas Transmission Company |
| | | Pacific Indonesia LNG Company |
| | | Pacific Transmission Supply Company |
| | | Rocky Mountain Gas Transmission Company |
| | | Standard Pacific Gas Line Corporation |
| | | (All other subsidiaries are wholly owned) |

| Party | Parent | Subsidiaries and Affiliates |
|---|---|---|
| Power Authority of the State of New York | — | — |
| Public Service Electric and Gas Company | — | (All subsidiaries are wholly owned) |
| Southern California Edison Company | — | (All subsidiaries are wholly owned) |
| Yankee Atomic Electric Company | New England Power Company | — |
| | The Connecticut Light and Power Company | |
| | Boston Edison Company | |
| | Central Maine Power Company | |
| | The Hartford Electric Light Company | |
| | Western Massachusetts Electric Company | |

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## MOTION TO DISMISS OR AFFIRM OF COMMONWEALTH EDISON COMPANY, *ET AL.*

---

Appellees Commonwealth Edison Company, *et al.*, move to dismiss this appeal or affirm the judgment below of the United States Court of Appeals for the Second Circuit.

## COUNTERSTATEMENT OF THE CASE

### Introduction

The "Question Presented" set forth by Appellants in their Jurisdictional Statement is extraordinary in two respects. First, it suggests that the Hazardous Materials

Transportation Act, 49 U.S.C. §§ 1801-1812 (1976 & Supp. V 1981) ("HMTA"), requires the preparation of an Environmental Impact Statement ("EIS"). Of course, there is no reference anywhere in the HMTA to an EIS or any other kind of analysis of effects on the environment. The requirement for an EIS—if it applies to this case—can come only from the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1976 & Supp. V 1981) ("NEPA"). Accordingly, we submit that Appellants have not tendered for review any issue concerning the interpretation of the HMTA. Our discussion of the merits will therefore center on the interpretation and application of NEPA by the Court of Appeals.

Second, the "Question Presented" framed by Appellants *was not decided below.* The District Court held that the *Final Regulatory Evaluation and Environmental Assessment* (DOT/HM-164) (1981) ("EA") prepared by DOT was inadequate, but, as the Court of Appeals noted, Judge Sofaer "did not rule that an EIS was required." App. 23a.[1] No cross-appeal was taken. Accordingly, the Second Circuit was not called upon to decide whether an EIS was required in the HM-164 rulemaking proceeding.

As the Court of Appeals put it: "The issue we face is whether the District Court subjected the Environmental Assessment to a more exacting and intrusive review than is permissible under NEPA." App. 29a. Holding that Judge Sofaer erred in doing so, the Second Circuit reversed. Assuming that this Court decides to consider the merits, that holding—Part IV of the Second Circuit's opinion—is all that should be reviewed.

### The Hazardous Materials Transportation Act and The Rulemaking Proceeding

The subject of this appeal is a nationwide highway safety and routing rule for radioactive materials trans-

[1] All App. references herein are to the Appendices to the Jurisdictional Statement.

port promulgated by the Department of Transportation ("DOT") in Docket No. HM-164 ("HM-164") pursuant to its authority under § 105 of the HMTA to issue "regulations for the safe transportation in commerce of hazardous materials." 49 U.S.C. § 1804(a) (1976). HM-164 was published on January 19, 1981 with an effective date of February 1, 1982. 49 C.F.R. § 177.825 (1983).[2]

Briefly, HM-164 specifies (a) general routing requirements applicable to carriers and shippers of low-level radioactive materials and (b) specific routing requirements for large-quantity shipments of radioactive materials, including spent nuclear fuel.[3] The carrier of low-level radioactive materials must ensure that the motor vehicle is operated on routes that minimize radiological risk, unless there is only one practicable highway route available or the motor vehicle is operated on a "preferred" highway. Carriers of high-level radioactive shipments, including spent nuclear fuel, must follow a "preferred route."

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[2] The rule, as published in the Federal Register, 46 Fed. Reg. 5298 (1981), contains a lengthy preamble describing the regulatory events that prompted DOT to investigate the need for a highway safety and routing rule for radioactive materials, the details of the rulemaking proceeding, and DOT's conclusions based on its analysis of various environmental studies. Those studies are discussed *infra* at 22 n.8.

[3] When HM-164 was enacted, specific routing requirements were applied to high-level radioactive materials consisting of "large-quantity shipments" (including spent nuclear fuel) as defined in the regulations of the DOT and the Nuclear Regulatory Commission ("NRC"). On March 10, 1983, the DOT published in the Federal Register final rules revising the requirements of the Hazardous Materials Regulations, effective July 1, 1983, to make them compatible with the regulations of the International Atomic Energy Agency. 48 Fed. Reg. 10,218 (1983). DOT replaced the term "large-quantity" with the term "highway route controlled quantity" in its regulations. The amounts regulated are not affected by the change in terminology. We will continue to refer to the term large-quantity in this motion to be consistent with the terminology used by the courts below.

A preferred route consists of the Interstate highway system and an Interstate system by-pass or beltway, when available, to avoid center-city neighborhoods. Recognizing the site-specific nature of routing, HM-164 provides that states, in consultation with affected localities, may establish an alternative route segment to the preferred route within their borders if they can demonstrate, in accordance with DOT guidelines, that the alternative route will provide at least the same degree of protection to public health and safety as the preferred route.

HM-164 contains other important provisions to ensure the safety of the highway transportation of radioactive materials, including requirements for driver training and preparing and carrying written route plans.

Once DOT has acted pursuant to § 105 to establish nationwide transportation regulations, § 112 of the HMTA specifies the preemptive effect of those regulations. Pursuant to § 112(a) of the HMTA, regulations promulgated by DOT automatically preempt any "inconsistent" transportation requirement of a state or political subdivision thereof. 49 U.S.C. § 1811(a) (1976).[4] Section 112(b) of the HMTA, however, authorizes DOT to exempt an inconsistent requirement of a state or local subdivision from the preemptive effect of § 112(a) if, acting on the application of an appropriate state agency, DOT determines that such requirement affords an equal or greater level of protection to the public than the DOT

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[4] For the purpose of advising a state or local government how it can exercise authority over motor carriers in a manner that would not be found to be inconsistent under the preemption provision of the HMTA, the DOT prepared an appendix to HM-164 ("Appendix A"). Appendix A provides, among other things, that a state routing rule which applies to a large-quantity shipment of radioactive materials is inconsistent with HM-164 if it "prohibits transportation of [such material] by highway between any two points without providing an alternative for the duration of the prohibition . . . ."

regulation and does not unreasonably burden commerce. 49 U.S.C. § 1811(b).

**The Complaints**

Section 175.111(l) of the New York City Health Code effectively prohibits the transport of certain radioactive materials through or into New York City. Admitting that this requirement is inconsistent with HM-164 because it prohibits the highway transportation of large quantities of radioactive materials through New York City without providing alternative highway routes, New York City (the "City") applied to DOT for a nonpreemption ruling pursuant to § 112(b) of the HMTA on March 20, 1981. Prior to any ruling by DOT on its nonpreemption request, the City filed a complaint in the United States District Court for the Southern District of New York against the DOT and its Materials Transportation Bureau, alleging that in promulgating HM-164, DOT failed to comply with the requirements of the HMTA and NEPA. The City also alleged that Appendix A to the DOT rule is without legal force and effect because it is in excess of the Secretary's jurisdiction and authority under the HMTA. The State of New York (the "State"), the Town of Brookhaven, and Sullivan County intervened as plaintiffs and Commonwealth Edison Company, *et al.* intervened as defendants.[5] The

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[5] The Utility Intervenors are listed in the Jurisdictional Statement at 1-2 n.* and in the Statement required by Supreme Court Rule 28.1 preceding this motion. In the Second Circuit, the briefs of Appellees Commonwealth Edison Company, *et al.*, were joined in by *Amici Curiae* American Electric Power Company, Inc., Arizona Public Service Company, Inc., Baltimore Gas and Electric Company, The Detroit Edison Company, Duke Power Company, Florida Power and Light Company, Kansas City Power and Light Company, Kansas Gas and Electric Company, Niagara Mohawk Power Corporation, Philadelphia Electric Company, Rochester Gas and Electric Corporation, Union Electric Company, and Virginia Electric and Power Company.

State's complaint was similar to the City's in that it alleged that the DOT violated HMTA and NEPA in issuing HM-164. In addition, the State claimed that § 112(a) of the HMTA was unconstitutional because it infringed on the sovereign powers of the State, and delegated to the Secretary of Transportation ("Secretary") the authority to preempt state and local requirements without adequate standards.

**The District Court Opinion**

The District Court rejected plaintiffs' constitutional challenges to both the HMTA and HM-164 outright. App. 86a-87a. The District Court held that (1) Congress lawfully delegated to DOT the authority to issue both transportation regulations and nonpreemption determinations, App. 87a; (2) the HMTA and its preemption provision are "well within the commerce power of Congress," App. 88a; (3) HM-164 is within DOT's authority to issue regulations to protect the nation from the hazards of radioactive materials transport, App. 90a-91a; (4) HM-164 adopts many measures that are "expressly and incontrovertibly designed to enhance safety," App. 91a-92a; (5) under § 112(a) of the HMTA, an inconsistent nonfederal rule is preempted, unless and until a nonpreemption ruling is obtained from DOT, App. 92a-97a; and (6) to the extent Appendix A rests on valid regulations, it serves valid and important regulatory needs and is a legitimate regulatory device, App. 97a-101a.

However, based on a detailed, exhaustive review of the record in the rulemaking proceeding, and the "evidence actually considered or implicitly supporting" HM-164, App. 61a, the District Court concluded that HM-164 is arbitrary, capricious, and an abuse of discretion insofar as it overrides nonfederal bans on truck transportation of spent fuel and other large-quantity shipments of radioactive material through densely populated areas such

as New York City. The court based this conclusion on its determination that, with respect to such shipments, DOT failed to prepare an adequate Environmental Assessment ("EA") as required by NEPA and violated the requirements of the HMTA. App. 183a-184a.

The court addressed DOT's examination of environmental consequences and finding of no significant impact by reviewing, at length, the evidence supporting DOT's estimation of probability, App. 114a-132a; its evaluation of consequences, App. 132a-138a; and its evaluation of public risk and impact, App. 138a-141a. Based on this review of the administrative record, the court held that DOT's finding of no significant impact with respect to shipments of spent fuel and other large-quantity radioactive materials through densely populated areas was arbitrary, capricious, and an abuse of discretion because "too many germane factors were ignored, too many material disputes in the underlying data were left unanalyzed and unresolved, and too many pivotal conclusions were generalizations and unsupported by the evidence." App. 142a.

The District Court also found that, whether or not DOT's finding of no significant impact was an abuse of discretion, DOT failed to comply with the NEPA obligation to "study, develop, and describe appropriate alternatives" to HM-164. Noting that DOT limited HM-164 to the consideration of highway routing from the outset and therefore only considered nine highway routing alternatives, including the no action alternative, the court found that DOT's consideration of alternatives was inadequate because of its failure to consider alternative modes of transportation. App. 142a-149a. In particular, the District Court faulted DOT for failing to consider the specific alternative proposed by the City—barging spent fuel and other large-quantity shipments to avoid densely populated areas.

After addressing DOT's compliance with NEPA, the District Court reviewed DOT's obligations under the HMTA and held that the HMTA requires DOT to adopt routing rules that minimize public risk without imposing unreasonable burdens and to maximize safety in hazardous materials transportation by evaluating alternatives to that end. App. 155a, 170a-183a. The court further held that DOT failed to meet its burden under the HMTA to demonstrate some need for overriding local rules keeping spent fuel and other large-quantity shipments out of densely populated areas. Finally, the court criticized DOT for its failure to consider the need to transport spent fuel and other large-quantity radioactive materials and to develop a record that would justify the shipment of such materials through densely populated areas despite local laws prohibiting such shipments. App. 183.

**The Second Circuit Opinion**

On the appeal of the federal defendants and the utility intervenors, the Second Circuit rejected the District Court's construction of the HMTA and held that the statute does not require the Secretary to issue regulations that maximize safety, but rather to issue regulations that set acceptable levels of safety for each mode of transportation. App. 11a. Since the Court of Appeals' construction of the HMTA—to which there was no dissent—is not subject to appeal here, we shall not discuss it further.

The Second Circuit then addressed the District Court's conclusion that DOT failed to comply with the NEPA duty to consider alternatives to HM-164. The Court of Appeals held that DOT did not act arbitrarily in refusing to consider in detail alternatives that would require the use of other modes of transportation. Because Appellants' "Question Presented" deals with the need to prepare an EIS, as opposed to the separate consideration of alternatives under § 102(2)(E) of NEPA, the latter

issue is not before this Court on appeal, so further discussion of the reasoning of the court below on that point is unnecessary.

The Second Circuit then addressed what it considered to be the key issue raised by the appeal: "whether the District Court subjected the Environmental Assessment to a more exacting and intrusive review than is permissible under NEPA." App. 29a. The court found that the certain environmental effects of HM-164 were not significant, and that it was only the risk of an accident that might render the proposed action environmentally significant. Evaluation of the environmental significance of that risk involved an estimate of the consequences of an accident and the probability of its occurrence. App. 25a-26a. After reviewing DOT's EA, and the studies underlying that EA, the court found that DOT did not abuse its discretion in concluding that HM-164 would not have a significant effect on the environment. In so doing, the Second Circuit opined that the District Court had subjected DOT's EA to an exacting and intrusive review on highly technical matters, App. 29a-30a, while the proper role of a reviewing court is to defer to an expert agency in its evaluation of matters at the frontiers of science.

The Second Circuit concluded its opinion by faulting the District Court for, in essence, inquiring into DOT's anticipated denial of the City's request for a nonpreemption ruling under § 112(b) of the HMTA, rather than the validity of HM-164 as applied on a nationwide basis. App. 39a-40a.

> If DOT ultimately denies New York City's pending application for a non-preemption ruling, the City can seek judicial review of that denial. At that time, a federal court will review the Department's action, if adverse, with the benefit of both the Department's explanation for its denial and a fully developed record comparing New York City's Health Code to HM-164 as applied to New York City. If the

> Court determines that the Department impermissibly denied the City's application for non-preemption, adequate relief will then be available. In the interim, however, Congress has legislated that the federal rule will govern.

App. 40a (footnote omitted).

Judge Oakes did not take issue with the majority's construction of the HMTA. Rather, Judge Oakes' dissent was narrowly focused on one issue—whether or not DOT's determination that HM-164 would not have a significant affect on the environment was arbitrary and capricious. Judge Oakes found that it was, based primarily on his opinion that "the effect of the 'worst-case' accident alone could be sufficiently substantial to justify an EIS, since the effect of HM-164 is to permit the transportation of nuclear waste and other materials through the most densely populated city in the United States, when 'credible' accidents may occur." App. 41a. Judge Oakes also agreed with Judge Sofaer's opinion that HM-164 is defective because it relies on insufficient or contradictory data and fails to address certain risks.

## MOTION TO DISMISS

### APPELLATE JURISDICTION FOR THIS APPEAL DOES NOT LIE UNDER 28 U.S.C. § 1254(2).

This appeal should be dismissed because the Court of Appeals did not find a state statute to be repugnant to the Constitution, treaties or laws of the United States within the meaning of 28 U.S.C. § 1254(2).

#### A. The Issue Below Was Not Whether Congress Intended HM-164 to Preempt Section 175.111(1) of the New York City Health Code.

Appellants allege that jurisdiction for this appeal lies under 28 U.S.C. § 1254(2) because the court below "held that the regulation HM-164 properly preempts a provision

of the New York City Health Code (§ 175.111[l])." Jurisdictional Statement at 5. This is a misleading characterization of the decision below. The Second Circuit held that HM-164 is a valid federal regulation. As such, by virtue of § 112(a) of the HMTA, HM-164 preempts any inconsistent state or local requirement for the highway routing of radioactive materials. This distinction is crucial because the propriety of an appeal under § 1254(2) depends not only on the reasoning and specific holding of the Court of Appeals, but also on the nature of the federal preemption. In this case, consideration of the specific holding of the Second Circuit and the rationale for that holding, in the context of the structure of § 112 of the HMTA, demonstrates that jurisdiction for this appeal does not lie under § 1254(2).

The specific holding of the Court of Appeals was that DOT complied with the requirements of both the HMTA and NEPA in promulgating HM-164. As a valid HMTA regulation, pursuant to § 112(a) of the HMTA, HM-164 preempts any inconsistent state or local requirement governing highway shipments of radioactive materials. The City admits that its local ordinance is "inconsistent with the federal rule." Complaint of the City of New York for Declaratory And Injunctive Relief, Appendix D at 8.

Accordingly, preemption results by operation of law, not by the decision of the Court of Appeals. As the Second Circuit put it: "Congress has legislated that the Federal rule will govern." App. 40a. That ruling does not come within the purpose or intent of § 1254(2).

The cases cited by Appellants in the Jurisdictional Statement at 5 do not support the exercise of this Court's mandatory jurisdiction in this case. In *Tully v. Mobil Oil Corp.*, 455 U.S. 245, 246 n.1 (1982), the Court found that it had jurisdiction under § 1254(2) to review a decision of the Temporary Emergency Court of Appeals holding that a New York tax law imposing a tax on the

gross receipts of oil companies and prohibiting the companies from passing the cost of the tax through to their customers was "in conflict with and therefore preempted by federal price control authority under the Emergency Petroleum Allocation Act . . . ." *Id.* at 245-46. In *Malone v. White Motor Corp.*, 435 U.S. 497, 499 (1978), the Court exercised its jurisdiction under § 1254(2) to review the Court of Appeals' holding that a state pension statute was preempted by the National Labor Relations Act. The Court's analysis focused on whether Congress intended the state statute to be preempted by the National Labor Relations Act. In both cases, the courts of appeals undertook to discuss and analyze in detail whether or not a state statute was preempted by a particular federal statute.

Here, by contrast, neither the District Court nor the Court of Appeals undertook any analysis of whether HM-164 preempted the City's ordinance. No such analysis was required. Congress, when it adopted the HMTA, expressly preempted all inconsistent state and local regulations. This is not an "appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ." 28 U.S.C. § 1254(2). The Second Circuit did not hold invalid the City's ordinance; Congress did.

**B. Neither the District Court Nor the Court of Appeals Specifically Addressed the Merits of the New York City Ordinance.**

The Court of Appeals did not consider or discuss the New York City ordinance whose invalidation is said to be the basis for this appeal, other than to note that the ordinance spawned the HM-164 rulemaking proceeding. In fact, from the beginning this case was *not* focused on the validity of the New York City ordinance. The City's complaint to the District Court challenged the validity of

HM-164, and requested a declaration that HM-164 and Appendix A are null, void, arbitrary and capricious and otherwise not in compliance with law; a declaration that the New York City ordinance is not inconsistent with the HMTA or with the regulations promulgated thereunder; an injunction prohibiting DOT from implementing HM-164 prior to the preparation of an EIS; and an injunction prohibiting DOT from applying the policy set forth in Appendix A. The State's complaint requested a declaration that HM-164 is null, void, illegal, unauthorized, and *ultra vires*; a declaration that § 112(a) of the HMTA is unconstitutional, illegal, and void; and a permanent injunction prohibiting DOT from enforcing HM-164 or relying on it for any purpose, including a determination of inconsistency with respect to a state or local routing rule. Neither complaint discussed the New York City ordinance in detail, nor asked the District Court to rule on its validity.

The District Court held that HM-164 "is arbitrary, capricious, and an abuse of discretion insofar as it overrides nonfederal bans on truck transportation of spent fuel and other large-quantity radioactive materials through densely populated areas such as New York City," App. 183a, and enjoined DOT from enforcing HM-164 and Appendix A "in such a manner as to override or preempt existing or future state or local bans on truck, highway, or road transportation of spent (irradiated) fuel and other large-quantity shipments of radioactive materials through densely populated areas . . . ." App. 55a-56a. In so holding, the District Court did not find it necessary to consider in detail the merits of the New York City ordinance. Thus, the issues presented to the Second Circuit on appeal centered on DOT's compliance with its obligations under HMTA and NEPA during the HM-164 rulemaking proceeding, not the relative health and safety impacts of the New York City ordinance and HM-164. App. 9a-10a.

As a general rule, an appeal does not lie under § 1254 (2) where neither the parties nor the courts below expressly addressed the merits of the relevant state statute. *Silkwood v. Kerr-McGee Corp.*, 52 U.S.L.W. 4043, 4046 (U.S. Jan. 11, 1984) ("*Silkwood*"); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562-63 n.4 (1980) (regarding 28 U.S.C. § 1257(2)); *Minnesota v. Alexander*, 430 U.S. 977, 978 n.1 (1977) (Stevens, J. dissenting); *Kulko v. Superior Court of California*, 436 U.S. 84, 90 n.4 (1978). There are two reasons for this rule. First, as this Court has emphasized, "statutes authorizing appeals are to be strictly construed . . . ." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 103 S.Ct. 948, 953 (1983). *See also Silkwood*, 52 U.S.L.W. at 4045; *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970); *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 650-51 (1942). The insistence that the court below expressly address the merits of the state statute comports with this policy, and places a necessary limit on the extent of the Court's jurisdiction under § 1254(2).

Second, the rule prevents this Court from becoming a trier of fact. Where the Court below has not specifically addressed the merits of the state statute invalidated by federal law, there is no factual record on which this Court can base its determination of the propriety of that invalidation. In a slightly different context, this Court has noted that it "possesses no empirical expertise" and will only "undertake independent examination of factual issues when constitutional claims may depend on their resolution." *Berenyi v. Immigration & Naturalization Service*, 385 U.S. 630, 636 (1967). This is not such a case.

In sum, as this Court recently stated in *Silkwood*, there is a distinction "between those cases in which a state statute is expressly struck down on constitutional grounds and those in which an exercise of authority un-

der state law is invalidated without reference to the state statute," and only the former comes "within the scope of § 1254(2)'s jurisdictional grant." 52 U.S.L.W. at 4045. This case falls within the latter category, and an appeal therefore does not lie under § 1254(2).

### C. There Are Strong Policy Reasons For Not Hearing This Appeal.

This appeal not only fails to satisfy the jurisdictional prerequisites of § 1254(2), but it also seeks to circumvent the orderly preemption process Congress embodied in § 112 of the HMTA. Congress intended DOT to determine whether or not a state or local requirement should be granted immunity from the preemptive effect of DOT's HMTA regulations, and set forth specific standards in § 112(b) of the HMTA to guide DOT in that determination.[6] In electing not to pursue its request for a nonpreemption determination, the City would deny DOT the opportunity to determine, through the exercise of its expertise, whether the New York City ordinance should not be preempted by HM-164 due to the unique circumstances of New York City. In effect, the City has failed to comply with the doctrine of exhaustion of administrative remedies.

The policy underlying that doctrine is both to prevent judicial disruption of administrative proceedings, *Bell v. New Jersey*, 103 S. Ct. 2187, 2191 (1983), and to ensure the development of a sufficient factual record to support a judicial decision. *Hooker Chemical Co. v. EPA*, 642 F.2d 48, 53 (3d Cir. 1981). These policy considerations are particularly appropriate in this case. For this Court

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[6] While the determination of inconsistency is judicial in nature and can be made by DOT or a district court, § 112(b) of the HMTA "delegates specifically to the Secretary . . . the power to decide whether a state or local regulation determined to be inconsistent nevertheless qualifies as an exemption from preemption." National Tank Truck Carriers, Inc. v. Burke, 535 F.Supp. 509, 514 (D.R.I. 1982), *aff'd*, 698 F.2d 559 (1st Cir. 1983).

to attempt to determine whether HM-164 should preempt the City's ordinance, based on its analysis of factors specific to the highway transport of radioactive materials in New York City, would not only completely disrupt the orderly operation of the DOT's administrative proceedings, but would also be contrary to the intent of Congress.

The impropriety of an appeal at this stage in the administrative and judicial process is best illustrated by a comparison to the correct manner in which this appeal should be brought to this Court. As the Second Circuit noted, if the City pursues its request for a nonpreemption determination, and DOT denies that request, "the City can seek judicial review of that denial . . . with the benefit of both the Department's explanation for its denial and a fully developed record comparing New York City's Health Code to HM-164 as applied to New York City." App. 40a. If that denial is upheld by both the District Court and the Court of Appeals, the City can seek further review from this Court at that time. On the other hand, if DOT were to grant the City's nonpreemption request, or a federal court were to reverse DOT's denial of the City's request, there would be no need for the City to seek further review by this Court. In any event, a finding by this Court that Appellants have not properly invoked its jurisdiction under § 1254 (2) at this time would not preclude Appellants from seeking review after they have first pursued their administrative remedies at DOT. Only then can Appellants come before this Court with a fully developed factual record and the benefit of DOT's expert opinion on the relative health and safety effects of the City's ordinance and HM-164 as applied to New York City.

## MOTION TO AFFIRM

### I.

### THIS COURT SHOULD AFFIRM THE SECOND CIRCUIT'S RULING THAT HM-164 IS A VALID FEDERAL REGULATION.

Appellants contend that the Question Presented in this case is whether DOT was required by NEPA and the HMTA to prepare an EIS prior to the promulgation of HM-164 "to consider the low probability, but catastrophic consequence risks attendant to shipment of [large-quantity radioactive materials] through urban areas, and to consider alternative modes of transporting such materials, including barging." Thus framed, the Question Presented by Appellants is extraordinary for two reasons. First, it suggests that DOT was required by the HMTA to prepare an EIS prior to the promulgation of HM-164. Of course, the HMTA contains no such requirement. Second, Appellants in essence have not asked this Court to reverse the holding of the Second Circuit, but rather to affirm Judge Oakes' dissent. That dissent is narrowly focused on an issue that was not presented to the court below and was not considered and decided by the majority. The Second Circuit simply held that DOT complied with the requirements of both the HMTA and NEPA in promulgating HM-164. In so holding, the Second Circuit decided no important constitutional or statutory issues. Nor is the decision below in conflict with that of another circuit court. The decision of the Second Circuit should be affirmed by this Court.

#### A. The Question Presented Arises Under NEPA, Not HMTA.

The Question Presented inquires into DOT's obligation to prepare an EIS in the HM-164 rulemaking proceeding to consider the low-probability/high-consequence risks attendant upon large-quantity shipments of radioactive materials through urban areas and the environ-

mental risks associated with the use of alternative modes to the highway mode to transport such materials. In promulgating HM-164, DOT was acting pursuant to a statutory mandate contained in the HMTA to promulgate regulations "for the safe transportation in commerce of hazardous materials." 49 U.S.C. § 1804(a) (1976). The HMTA imposes substantive obligations on DOT; it does *not* require DOT to prepare an EIS in the performance of those substantive obligations. In contrast, NEPA is essentially a procedural statute, *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 558 (1978) (*"Vermont Yankee"*); it requires DOT to prepare an EIS when considering the implementation of "major Federal actions significantly affecting the quality of the human environment" pursuant to its substantive enabling statute. 42 U.S.C. § 4332(2)(C) (1976).

Nor does the HMTA require DOT to consider alternative modes of transportation when promulgating regulations governing a particular mode. NEPA, however, requires that an EIS contain an analysis of alternatives to a proposed agency action. 42 U.S.C. § 4332(2)(C). Although the scope and timing of an agency's duty to consider alternatives to a proposed action is a function of the agency's implementation of its substantive obligations, and the manner in which the agency structures its proceedings, that duty is imposed by NEPA, not the HMTA. *See NRDC, Inc., v. SEC*, 606 F.2d 1031, 1056 (D.C. Cir. 1979); *see also Vermont Yankee*, 435 U.S. at 558.

DOT has no obligation under the HMTA to prepare an EIS to consider the environmental consequences of its actions—its obligation to do so is imposed by NEPA. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). The question presented in Appellants' Jurisdictional Statement invites this Court to construe DOT's obligations under NEPA, and in so doing fails to tender for review by this Court any issue concerning the Second Circuit's interpretation of the HMTA.

**B. The Question Presented Was Not Decided By The Second Circuit.**

As noted previously, the Question Presented focuses on the need for an EIS in the HM-164 rulemaking proceeding. This theme is further developed in the Jurisdictional Statement, which states:

> DOT took the unusual action of refusing to prepare an EIS on a project that could result in a deadly and calamitous nuclear accident within a crowded, urban area. The question whether such refusal is arbitrary and capricious, and contrary to law, is a substantial issue meriting review by this Court.

Jurisdictional Statement at 17.

Contrary to Appellants' implication, the Second Circuit was not asked to review a determination by the District Court that HM-164 was invalid because DOT failed to prepare an EIS. The District Court held that on the record before it, "DOT's environmental assessment was inadequate, and its finding of no significant impact was arbitrary, capricious, and an abuse of discretion . . . ." App. 142a. The District Court did *not* hold that an EIS was required, nor did it grant the City's request that it enjoin DOT to prepare an EIS prior to the implementation of HM-164. Neither the City nor the State cross-appealed to the Second Circuit.

In addressing the adequacy of DOT's EA, the Second Circuit noted that

> [t]he District Court did not rule that an EIS was required. Instead, Judge Sofaer concluded that the Environmental Assessment was flawed in its consideration of *whether* HM-164 would "significantly" affect the environment. Though he strongly intimated that DOT would be obliged to conclude that an EIS was required, once it remedied the shortcomings that he perceived in the Assessment, his ruling faulted the sufficiency of the Assessment, not the absence of an EIS.

App. 23a (emphasis in original). The Second Circuit then proceeded to analyze the adequacy of DOT's EA in light of the standards circumscribing judicial review of agency action set forth by this Court in *Baltimore Gas & Electric Co. v. NRDC, Inc.*, 103 S. Ct. 2246 (1983), App. 23a, and held that DOT complied with NEPA because its EA provided an adequate basis for DOT's conclusion that HM-164 "did not create a 'significant' risk for the human environment," App. 39a, and therefore "an EIS was not required." App. 23a.

Both the District Court and the Second Circuit, in reviewing DOT's compliance with NEPA in the promulgation of HM-164, considered the adequacy of DOT's EA. The issue before the lower courts was *not* whether DOT violated NEPA by not preparing an EIS.[7]

Nevertheless, Judge Oakes' dissent treated the case as if the issue were whether "the effect of the 'worst-case' accident alone would be sufficiently substantial to justify an EIS, since the effect of HM-164 is to permit the transportation of nuclear waste and other materials through the most densely populated city in the United States, when 'credible' accidents may occur." App. 41a. In framing this issue, Judge Oakes erroneously stated that the District Court held that DOT violated NEPA by concluding that HM-164 would not significantly affect the environment and that an EIS therefore was unnecessary. App. 41a. As noted above, the District Court

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[7] This Court has repeatedly held that a cross-appeal is necessary when the logical result of acceptance of a respondent's argument would be to change more of the judgment than is brought into issue by the initial appeal. Strunk v. United States, 412 U.S. 434, 435-36 (1973); Brennan v. Arnheim & Neely, Inc., 410 U.S. 512, 516 (1973); NLRB v. International Van Lines, 409 U.S. 48, 52 (1972); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 (1970). As a corollary to this rule, Appellants should be estopped from arguing to this Court that HM-164 is invalid because DOT failed to prepare an EIS when the District Court refused to so hold and Appellants did not cross-appeal to the Second Circuit.

did not so hold, and Appellants did not challenge the District Court's conclusion on appeal.

In sum, Appellants have asked this Court to affirm Judge Oakes' dissent, and have posed a question that was not considered or decided by the majority below.

## II.

### THE SECOND CIRCUIT'S HOLDING THAT DOT'S EA COMPLIED WITH THE REQUIREMENTS OF NEPA IS CORRECT.

Assuming this Court decides to consider the merits of this appeal, it should affirm the Court of Appeals' determinations that DOT "did not violate NEPA in deciding that an EIS was not required," App. 23a, and that DOT properly decided that the remote possibility of a serious accident "did not create a 'significant' risk for the human environment." App. 39a.

The Second Circuit undertook its analysis of the adequacy of DOT's EA with three guiding principles in mind. First, the proper role of a court in reviewing agency compliance with NEPA "is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas & Electric Co.*, 103 S. Ct. at 2253. App. 23a; 29a-30a. Accordingly, the role of the Second Circuit was to determine "whether the District Court subjected the Environmental Assessment to a more exacting and intrusive scrutiny than is permissible under NEPA." App. 29a.

Second, the purpose of the EA was "to consider environmental ramifications of a national rule" which would have an effect "on the environmental quality of the nation as a whole." App. 24a. DOT's mandate under NEPA therefore was to consider not just the environmental effect of the highway transportation of radioactive materials through densely populated urban areas,

but the environmental effects of such transportation nationwide.

Third, DOT was obligated by its mandate in the HMTA to assess both "the effect of transporting radioactive materials on the level of background radiation" and "the risk that such transportation might result in accidents with the potential of causing serious damage." App. 24a. To implement this mandate, DOT focused its EA on the overall environmental impact from the transportation of radioactive materials, rather than solely on the risk posed by transportation accidents.

Mindful of its circumscribed role in reviewing DOT's EA, and the fact that NEPA "mandates no particular substantive outcomes," App. 29a, the Court of Appeals looked at the studies [8] underlying the EA and DOT's method of risk analysis, and found that the EA faced up to the task imposed by NEPA. App. 24a-26a. However, noting that "the District Court took the Department to task for its treatment of highly technical matters relating to the probability, consequences, and overall risk of one particular facet of a rule that indisputably enhances safety on a nationwide basis," App. 30a, the Second Circuit separately examined DOT's assessment of the probabilities, consequences, and overall risk of high-consequence accidents, and the District Court's critique of that assessment. Based on its thorough review of these factors, the court below concluded that there was "no legal infirmity in DOT's conclusion." *Id.*

Judge Oakes' dissent is narrowly focused on his opinion that "the effect of the 'worst-case' accident alone would

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[8] DOT relied primarily on three studies in preparing its EA: (1) *Final Environmental Statement on the Transportation of Radioactive Materials by Air and Other Modes* ("NUREG-0170") (1977); (2) *Report to the President by the Interagency Review Group on Nuclear Waste Management* ("IRG Report") (1979); and (3) *Transportation of Radionuclides in Urban Environments; Draft Environmental Assessment* ("Sandia Report") (1980).

be sufficiently substantial to justify an EIS, since the effect of HM-164 is to permit the transportation of nuclear waste and other materials through the most densely populated city in the United States, when 'credible' accidents may occur." App. 41a.[9]

As a preliminary matter, Judge Oakes' opinion is based on an erroneous interpretation of the meaning of DOT's use of the word "credible." Judge Oakes adopted the District Court's use of the word "credible" to describe an event that is plausible or likely to occur. As pointed out to the Second Circuit in our brief on appeal, however, the term "credible" has a different meaning in risk analysis than it does in everyday usage. In risk analysis, a "maximum credible" event is one that marks the theoretical boundary, for design purposes, of consequence evaluation. It represents the worst possible combination of theoretical accident possibilities and consequences. *It does not denote an event that is likely to occur.*

In any event, DOT considered in the EA both the probabilities and consequences of a worst-case accident, relying on the data contained in the Sandia Report and NUREG-0170. Discounting the consequences by the prob-

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[9] This issue was recently addressed by the Council on Environmental Quality ("CEQ"). As part of its oversight of implementation of NEPA, CEQ invited public comment on the type of guidance that should be provided to federal agencies with respect to implementation of the CEQ's regulations dealing with worst-case analysis. 48 Fed. Reg. 36,486 (1983). In its notice, the CEQ indicated its concern "that the worst case analysis requirements are being read to require federal agencies to conduct such analyses for potential effects that may well be highly remote or unlikely." *Id.* at 36,487. The CEQ explained that under its existing regulations, "speculative information or potential adverse impacts with an extremely low probability of occurrence could not be considered 'essential to a reasoned choice among alternatives . . . .' Consequently, such information or potential impacts would not meet the threshold of 'reasonable foreseeability' requiring preparation of a worst case analysis." *Id.* The CEQ has not yet taken final action on this matter.

ability of their occurrence, DOT found that shipments pursuant to HM-164 "might be expected to generate a catastrophic accident approximately once every 300 million years." App. 39a. In DOT's view, such a remote possibility of a serious accident "did not create a 'significant' risk for the human environment." Judge Oakes' personal opinion that the infinitesimal possibility of a catastrophic accident is sufficient to mandate the preparation of an EIS, no matter how deeply felt, does not suffice to render DOT's contrary determination arbitrary and capricious. As the majority below pointed out, this Court has repeatedly emphasized that neither NEPA nor its legislative history "contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions . . . . The only role for a court is to ensure that the agency has taken a 'hard look' at environmental consequences." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Baltimore Gas & Electric Co.*; App. 38a-39a. Judge Oakes' opinion suffers from the same flaw as that of the District Court in that it oversteps the proper role of a court in reviewing an agency's compliance with NEPA. Not only did Judge Oakes fail to accord proper deference to the reasoned determination of DOT, but he advocates the adoption of a *per se* rule that an EIS is required for every agency action that entails the possibility of a serious accident, no matter how remote that possibility. Such a rule would render an EIS necessary in virtually every agency action, and thereby nullify the Congressional mandate that an EIS is required only if an action has a significant effect on the environment. App. 39a n.20.

Judge Oakes further opined that "HM-164 is itself defective because it relies on insufficient or contradictory data at several crucial points and because it fails to address certain risks . . . that bear directly on the possibility of a serious consequence, 'worst-case' accident." App. 45a. Judge Oakes then proceeded to discuss what

he perceived to be several crucial problems in DOT's EA. His discussion of these problems, however, is based on the various studies, data, testimony, and public comments contained in the administrative record which underlie DOT's EA. As a result, it indicates more a disagreement with the specific conclusions reached by DOT than a holding that DOT failed to gather or analyze sufficient data to comply with NEPA. Moreover, by selecting isolated fragments of the administrative record relevant to a particular aspect of DOT's environmental analysis, such as accident frequency or human error, Judge Oakes lost sight of the fact that the focal point for judicial review of an agency's compliance with NEPA is the entire administrative record before the agency, not solely the four corners of an EA or EIS. *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 369 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981), *quoting Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Upper West Fork River Watershed Ass'n v. Corps of Engineers*, 414 F.Supp. 908, 916 (N.D.W.Va. 1976), *aff'd*, 556 F.2d 576 (4th Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978). DOT relied on numerous prior studies and documents in preparing its EA, all of which are identified in the EA and available to the public. Judge Oakes' criticism of DOT's conclusions on certain factors indicates a persistent refusal to acknowledge that an agency may proceed with a major federal action despite the existence of uncertainty in the underlying data, *Alaska v. Andrus*, 580 F.2d 465, 473-74 (D.C. Cir. 1978), *vacated in part on other grounds sub nom. Western Oil & Gas Ass'n v. Alaska*, 439 U.S. 922 (1978), and may reach a conclusion different than that he would have reached.

* * * *

This case should be seen for what it is. Appellants apparently believe that DOT will not issue a nonpreemption determination with respect to the New York City ordinance and therefore have declined to pursue the course set up by Congress in § 112(b) of the HMTA.

In so doing, they have deprived the DOT of the opportunity to analyze the relative safety merits of HM-164 and the New York City ordinance which would result in the barging of radioactive materials around New York City, and consequently have deprived this Court of any factual record on which to base a determination that the New York City ordinance should or should not be exempted from the preemptive effect of HM-164. Appellants should not be allowed to ignore the carefully developed process set up by Congress in the HMTA and burden this Court with matters that properly lie in the first instance before DOT.

## CONCLUSION

For the foregoing reasons, this appeal should be dismissed or, in the alternative, the judgment below should be summarily affirmed.

Respectfully submitted,

HARRY H. VOIGT *
LEONARD M. TROSTEN
MINDY A. BUREN
LEBOEUF, LAMB, LEIBY
& MACRAE
Suite 1100
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 457-7500
*Attorneys for Appellees Commonwealth Edison Company, et al.*

* Counsel of Record